7. (Unclassified - THW) BRIEFING I called Tom Smeeton, House International Relations Committee staff, to check on the briefing for Representatives William Broomfield (R., Mich.), Thomas E. Morgan (D., Pa.), and Clement J. Zablocki (D., Wis.) on the files obtained by the North Vietnamese when they invaded Saigon. Smeeton said that Representative Broomfield had been unable to line up Representatives Morgan and Zablocki and had cancelled the request for the time being.

8. (Unclassified - THW) LIAISON I called Marian Czarnecki, Chief of Staff, House International Relations Committee, with respect to the letter from Representative Thomas E. Morgan (D., Pa.), Chairman of the Committee, asking for comments on Representative Michael Harrington's (D., Mass.) resolution 1295. We discussed the status of the matter and procedural aspects. Czarnecki suggested that we discuss our draft answer with him informally before it is finalized.

I also mentioned the letter from Representative Lester L. Wolff (D., N.Y.), Chairman of the Special Subcommittee on Future Foreign Policy Research and Development, and told him that the Director was reluctant to authorize the appearance of [redacted] on the basis that he does not want Agency personnel involved in policy discussions. Czarnecki said that while he would be willing to approach Chairman Morgan, the Director should call the Chairman directly.

STATINTL

9. (Unclassified - WPB) LEGISLATION Called Bob Carlstrom, OMB, and cleared Assistant Attorney General Richard L. Thornburgh's testimony on S. 1343, "The Right of Financial Privacy Act of 1973," before the Senate Committee on Banking, Housing and Urban Affairs.

10. (Internal Use Only - WPB) LEGISLATION Called Russ Rourke, on the White House staff; Sam Goldberg, Deputy Assistant Secretary of State for Congressional Relations; and Tom Smeeton, on the Minority staff of the House International Relations Committee, to alert them to Representative Michael Harrington's (D., Mass.) resolution of inquiry [redacted] Goldberg asked that we send him whatever information we send to the NSC.

STATINTL

OLC 76 1702

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 11, 1976

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

Department of the Treasury
Federal Reserve Board
Federal Home Loan Bank Board
Federal Deposit Insurance Corporation
Export-Import Bank
Central Intelligence Agency
Domestic Council Committee on the
Right of Privacy

SUBJECT: Richard L. Thornburgh's testimony on S. 1343, a bill, "The Right of Financial Privacy Act of 1973."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than c.o.b. Monday, June 14, 1976

Questions should be referred to Robert E. Carlstrom (395-3857) ~~or to~~ the legislative analyst in this office.

cc: Mr. Bedell
Mr. Reeder
Mr. Arnold
Mr. Parsons
Mr. Lazarus

Bernard H. Martin for
Assistant Director for
Legislative Reference

Enclosures

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DRAFT

TESTIMONY

OF

RICHARD L. THORNBURGH
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
DEPARTMENT OF JUSTICE

ON

S.1343

THE RIGHT TO FINANCIAL PRIVACY ACT OF 1973

BEFORE

THE SENATE COMMITTEE ON BANKING,
HOUSING AND URBAN AFFAIRS

JUNE 17, 1976

Approved For Release 2001/11/16 : CIA-RDP77M00144R000800110014-0

I appreciate the opprotunity to appear before you today to give the views of the Department of Justice on S.1343. This Bill would prohibit the disclosure of financial records by a financial institution to any officer, employee, or agent of the United States, or any agency or department thereof or of a State or local government, except in four limited instances to be discussed in more detail later. Under the Bill, any government officer or employee who discloses or obtains financial records, other than under one of the Bill's exceptions, would be subject to a civil action for damages to the aggrieved customer, and, in the case of a willful and knowing violation, to criminal penalties of up to one year imprisonment or a fine of $5,000 or both. The Bill also provides that no waiver of any rights created therein "shall be valid, whether oral or written, and whether with or without consideration."

The Department of Justice is strongly opposed to the enactment of this Bill. Although we acknowledge the existence of a privacy interest of some dimensions on the part of customers in the financial records pertaining to their transactions that are in the hands of the financial institutions with which they do business, that privacy interest, in our view, is far outweighed by the critical need of the government for such records in the legitimate pursuit of white-collar, organized crime and corruption offenses. In other words, while this Department firmly believes that financial records should be protected from abuse, use in legitimate criminal investigations by law enforcement authorities is, in our view, not an abuse. Restrictions on the examination of such records by commercial enterprises or private individuals may well be justifiable; and we would have no objection to such legislation. However, the thrust of this Bill

is in precisely the opposite direction. Notably, although the Bill bars disclosure to criminal investigators, except in certain instances such as where a court order is obtained, it contains no similar prohibition or restrictions on disclosure to private individuals or commercial entities. This results in a somewhat peculiar position for the proponents of the Bill. The privacy interest which the Bill is designed to protect apparently is deemed to outweigh the public's right to effective enforcement of the laws, but must bow to the commercial need for such information (as well as any Congressional need).

The fact is, however, that there is no privacy interest, constitutional or otherwise, of sufficient scope or strength to support the restrictions on governmental access to financial records proposed here. As the Supreme Court recently held in United States v. Miller, ___ U.S. ___ (1976), there is no "reasonable expectation of privacy" in such records. A person authorizes the creation of such records, by engaging in the activity or transaction, knowing that these records will be out of his possession and viewed by any number of employees of the institution he is dealing with as well as other institutions; that other commercial entities may request and obtain such records in the normal course of business; and that criminal investigators may see these records for a proper law enforcement purpose. This has been the case with respect to federal access to such records ever since the records have been kept. Indeed, governmental access to criminal investigators has often been a principal purpose in requiring that such records be

created and kept. In enacting the Bank Secrecy Act of 1970, for example, Congress noted that a main purpose in requiring certain bank records to be maintained was that they "have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings." (18 U.S.C. 1829b(a)(1)).

The privacy interest in the financial records covered by this Bill is little different from the privacy interest of any other of the records which may be created by commercial entities about us or our activities in our daily lives. Would any reasonable person consider it inappropriate for criminal investigators, without first receiving legal process or informing the customer, to review gasoline station records to determine whether a described car had recently purchased gasoline there, or hardware store records to determine whether a particular person had purchased large quantities of poison, or hotel records to determine whether a particular person had been a guest at a particular time, or taxicab records to determine whether a recent customer had been dropped at a particular place, or records from a sporting goods store concerning the purchase of a telescopic sight? Such actions are, to be sure, "invasions of privacy" to some degree, just as the examination of bank records can be, but they are clearly not unwarranted intrusions into areas where a customer has a countervailing superior interest and expectation of privacy.

I would note further that the information contained in the financial records described in this Bill, like the information contained in most other commercial records, is information which may be obtainable by questioning the various employees of the institutions involved in the particular activities or transactions; and I presume that there is no

suggestion by the proponents of this proposal that criminal investigators could or should be barred from, or required to obtain a court order before, questioning these persons. The records are, of course, preferable, not only because they are much easier to obtain -- indeed the individual questioning of the persons involved would be prohibitive in both the time and the expense it would require -- but also because the records are considerably more reliable.

In short this Bill is objectionable because it reflects a view, which has no foundation in logic, history or experience, that the privacy interest of a customer in relation to "his" financial records is more important than that of society in the investigation of financially related crimes.

At a time where there is considerable concern for the increased investigation and prosecution of white-collar and organized crime and government corruption, it seems particularly inappropriate that a proposal of this nature should be given serious consideration. To be sure, the Bill may make it more convenient for bankers and other financial institutions, but at a terrible price. I would like to leave no doubt in your minds that this proposal will seriously hamper

all forms of criminal investigations, but especially those concerning white-collar crime, organized crime, and official corruption.

To make clear the devastating impact this proposal would have on investigation of criminal activity let me consider in turn the practical value of each of the four exceptions the Bill provides to its general prohibition of disclosure of financial records to government authorities.

The first exception, provided in Section 6, authorizes disclosure where it is specifically authorized in a written and signed statement by the customer. Obviously, no person involved in criminal activity whose financial records would assist in the detection and prosecution of that activity is likely to give such an authorization. And note that even if such an authorization had previously been obtained -- from a government official, for example, as a prerequisite to his obtaining a certain position -- such prior authorization is limited to a period of one year and apparently may be revoked at any time.

Section 7 of the Bill permits disclosure under an administrative summons or subpoena "otherwise authorized by law." Administrative subpoenas are not, however, generally available to federal criminal investigators. And where an investigator, outside the Department of Justice, has access to such an administrative subpoena, its usefulness is severely limited by the requirement that the customer be notified of the government's investigation and inquiry, by the customer's ability to challenge the subpoena or summons in court, and by the delay inherent in such litigation. I shall discuss in more detail the problems caused by these requirements in a moment.

Section 8 of the Bill permits disclosure of financial records if a search warrant is obtained pursuant to Rule 41 of the Federal Rules of Criminal Procedure. Such a procedure is available to criminal investigator but two aspects of the proposal make it of little practical value. First, under Rule 41 a search warrant may issue only where the magistrate or judge is satisfied that probable cause exists. Unfortunately, it is the rare criminal investigation, especially in the areas of white-collar or organized crime or official corruption, where evidence amounting to probable cause exists at the beginning of the investigation. A criminal investigation must begin somewhere. Many, if not most, are instituted upon the basis of allegations and suspicions. They ordinarily proceed by inquiring of a large number of people in the hope of developing evidence amounting to probable cause. When investigators examine written records they are essentially doing nothing different from asking questions of the persons who made or were involved in making the records, except, as I noted previously, that the records are more accurate. In financially related offenses the complexity and surreptitious nature of the crimes almost always requires that the investigation begin with the review of the available financial records. Such records are, frankly, the only effective means by which we combat the financially related offenses that are so detrimental to the community and to the integrity of its government and financial institutions.

To understand why financial records are so important to the start of the investigation and prosecution of white-collar crime, one must first recognize that non-violent economic crime is substantially different in nature from the street crime on which is based so much of the

public's attitude toward law enforcement. With "street" crime, it is usually readily apparent that a crime has been committed. There is usually an outraged victim; there may be witnesses to overt physical acts, and there is almost always some form of tangible evidence. The main question, then, is the identity of the offender. In contrast, in white-collar crime, which comprises the bulk of federal prosecutions, the putative "victim" may be the offerer of a bribe to a corrupt government official and will not complain to law enforcement officers. The real victim, the public, is not even aware that it has been victimized. Usually, there are no witnesses to the actual commission of the crime; the only evidence that exists is in the financial records of those involved. The question for the investigator to resolve is often whether or not a crime has been committed -- a question which can usually only be answered by discovering a fault in a seemingly sound structure of apparently unrelated financial transactions. In order to uncover these skillfully disguised illegal transactions, it is frequently necessary to get a complete financial profile of all suspected participants in a corrupt scheme and thoroughly analyze all financial transactions which could have been utilized to disguise corrupt payments. No investigation of organized crime or major official or corporate corruption, therefore, can proceed effectively without securing at the outset the financial records of those persons and organizations under investigation, since those records are the foundation for the transactional financial analysis.

Beyond the need for financial records as a starting point for criminal investigation, the search warrant provision in S.1343 is of slight practical value because it requires notification of the customer when such a warrant issues. Such notification, which is present in each of the four excepted disclosure provisions in the Bill, is extremely detrimental to an ongoing criminal investigation because it provides the opportunity for the destruction of other evidence of the crime, it warns those engaged in continuing criminal activity that investigators are beginning to focus on their activity, and it may give the criminal sufficient time and notice to flee or to impede the investigation through any number of approaches.

The fourth and last exception to the Bill's prohibition against disclosure, provided in Section 9, would permit investigators to obtain financial records pursuant to a judicial subpoena but only after the customer has been notified and has been given ten days to move to quash the subpoena. If a motion to quash is filed -- and what person involved in criminal activity would not file such a motion? -- a court must determine whether the subpoena is issued for "good cause" and whether it is "material to the inquiry." Only after such a determination is disclosure to the investigators permitted. This proposal has many of the disadvantages discussed above: It incorrectly assumes that when investigations of financially related offenses begin the investigators somehow already have sufficient evidence to meet the burdens of "good cause" and materiality required to gain access to financial records; and it gives suspects notice that they are under preliminary investigation and of the scope of that

investigation. It has, in addition, the distinct dvantage of a built-in delay provision of up to ten days, at ast, and a considerably longer period if a motion to quash ed and litigation ensues. Indeed, such litigation could be carried hrough the entire federal appellate court hierarchy with a consequ lay of many months, perhaps as long as the eighteen-month maximum li che grand jury itself!

In the kind of investigations at issue investigators must often build a case by using what they learn from ecord in order to know enough to seek another. The cloak that th cipants have so carefully laid over their activity must be unra by a succession of documents, ideally without notice to the suspect n any event without the opportunity for litigious delay. The amou lay and preliminary litigation between each record disclosure which ill would foster would effectively cripple any investigation of erning financially related offenses.

Furthermore it is deserving of com beyond all the foregoing restrictions, the Bill would preclu authorities from using or retaining records "for any purpose o the specific statutory purpose for which the information w lly obtained" (section 10). This is highly objectionable o out any legitimate rationale. The provision runs counter to a w ished body of law that evidence legally obtained for one purpo sed for other proper law enforcement purposes. E.g., Cool Hampshire, 403 U.S. 443, 464-473 (1971). For example, ook law that

narcotics found during an airport inspection of baggage for weapons is admissible in evidence in a narcotics prosecution. No different principle is warranted with respect to the records covered by this Bill. Thus a grand jury that legally obtained access to such records pursuant, for instance, to a criminal fraud investigation should not be precluded from using them as the basis for an indictment for illegal gambling or income tax evasion if such violations were revealed by the records. For the Bill to preclude such a legitimate use of information is not only unfounded and seriously damaging in itself, but it might also give rise to claims of "taint" in which the government would have to demonstrate that its evidence relating to "another" offense than that for which the records were sought was obtained independently. Such a burdensome requirement, as applied to information that is legally secured, is an astonishing proposal that would seriously cripple criminal investigations.

We stress, finally, that it is the Bill's restrictions on the access of federal grand juries -- judicial bodies -- to financial records that causes us the greatest concern, for not only is the grand jury the primary investigative tool for unravelling corruption and white-collar offenses, it is also the entity which, precisely because of its judicial character and close superintendence by the federal courts, poses the least risk of abuse of any privacy interest that attaches to the financial records at issue in this legislation.

The Bill would, of course, radically alter the broad latitude in conducting investigations that Federal grand juries have traditionally

been accorded. At present, grand juries may investigate upon the mere suspicion that a law has been violated, and may inquire into an area without having a defendant or criminal charge specifically in mind. At the same time, grand jury proceedings have always been conducted in the strictest secrecy, as required by the Federal Rules of Criminal Procedure. The stringent secrecy rules applicable to grand juries are designed in part to encourage witnesses to come forward to testify freely and to reduce the chances that an offender may flee or use corrupt means to avoid conviction. In addition, however, the secrecy rules under which grand juries function operate as a strong safeguard against unwarranted dissemination of evidence and information, including information concerning the very types of records that this Bill is intended to protect. Such secrecy rules, we would argue, are themselves sufficient to protect against grand jury abuse of the privacy interest attaching to such records and there is thus no need for the crippling procedural restrictions which this Bill would place on grand jury access to financial records.

Moreover, we emphasize that for two centuries neither the exclusionary rule nor a Fourth Amendment standard of reasonableness has been applied to grand jury proceedings, in recognition of the crucial importance of not permitting the orderly progress of an investigation to be delayed or disrupted. In United States v. Dionisio, 410 U.S. 1 (1973), the Supreme Court overturned a lower court holding that required a preliminary showing of reasonableness in order to comply with a grand

jury subpoena. The Court noted:

> Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.

This Bill's provisions would, as to an important category of records, breach this vital principle and would, consequently, fatally impair the ability to investigate many criminal offenses, particularly those concerning governmental corruption and white-collar and organized crime. Before it enacts, in the name of a privacy interest of very modest dimensions, legislation that would have such a disastrous impact on the consumer and the public through tying the hands of federal law enforcement authorities, we urge this Committee, and the Congress, to seriously consider the consequences and the relative priorities involved.